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VIA E-MAIL DOCKETS@ENERGY.STATE.CA.US

California Energy Commission
1516 9th Street, MS-4
Sacramento, CA 95814

Re: Docket No. 03-CRS-01

Dear Commission:

Following are the Joint Parties Interested in Distributed Generation/Distributed Energy Resources' (Joint Parties) comments on the regulations proposed by the California Energy Commission (CEC) to implement the California Public Utilities Commission (CPUC) Decision 03-04-030 (as modified by Decision 03-04-031) (Decision) regarding the cost responsibility surcharge (CRS) obligations of departing load customers served by customer generation. As appropriate, the Joint Parties also respond to points raised at the July 16, 2003 workshop sponsored by the CEC (Workshop).

The Joint Parties appreciate the opportunity to comment on the proposed regulations and to work with the CEC to develop regulations that accurately implement the goals set forth in CPUC Decision 03-04-030. The Joint Parties' comments are offered with the goal of ensuring consistency between the CEC's proposed regulations, the Decision and applicable laws.

Comments on Proposed Section 1395.1

The Joint Parties agree with comments offered at the workshop by Energy Producers and Users Coalition (EPUC) regarding the need to conform the definition of "Customer Generation" in the proposed regulations with the definition set forth in the Decision at page 3. This requires adding to the proposed definition a statement that the generation may serve "the customer's affiliates and/or tenant's, and/or not more than two other person's or corporations."

The Joint Parties agree with the decision articulated by the CEC at the Workshop to require PG&E to address before the CPUC any discrepancies PG&E has identified between the definition of "Departing Load" in the Decision and Public Utilities Code section 369. We agree with the CEC that it is not within their jurisdiction to interpret the CPUC's Decision.

Comments on Proposed Regulation 1395.2

A. Subsection (b) - Queue Process Needs To Provide Greater Certainty

For those projects which are subject to the 3,000 MW cap, greater certainty needs to be provided earlier in the process that if a project meets the eligibility criteria, it will have a place in the queue. As the procedure was proposed under section 1395.2, the utility first conducts an initial review before the CEC determines whether the megawatt cap has been exceeded. An applicant is to submit a DL CRS Information Form to the Utility, which, if complete, is forwarded to the CEC within 10 days. The CEC then determines if the customer is eligible for the CRS exemption and if there is space available under the designated Megawatt Cap. From a project development point of view, this leaves too much uncertainty for too long. An applicant needs to know before they submit their DL CRS Information Form that there is room in the queue. To not have this type of certainty would make it impossible for companies to offer fixed prices to their end-use customers.

The Joint Parties recommend that the CEC create a process that would allow pre-reservation of a spot in the queue. Such a process would occur before the utility conducts its initial review and the CEC determines eligibility, and would reserve space in the queue for 90 days, with extensions permissible on a case-by-case basis where the applicant is able to show that they have a contract for the project. Milestones that evidence definite progress can be specified by the CEC that would obviate phantom or "deceased" projects.

B. Subsection (c)(3) - Outstanding Issues Currently Pending Before CPUC

As stated during the Workshop, the Joint Parties believe that there are several outstanding issues regarding interpretation of the Decision currently pending before the CPUC that cannot be incorporated into the proposed regulations until the CPUC has made rulings resolving those issues. The Joint Parties have submitted protests to the advice letters filed by the utilities to implement the Decision which highlight some of the unresolved issues. With respect to proposed regulation 1395.2(c)(3), the Joint Parties reiterate the following points.

- *CRS Exemptions for Small Clean and Net-Metered Systems Do Not Expire When the 3,000 MW Cap Is Reached*

Subsection (c)(3) of proposed section 1395.2 provides that exemptions from the DWR Power Charge applicable to the small clean and net-metered projects would expire when the 3,000 MW cap is reached. In the Joint Parties' view, this is inconsistent with the Decision. The Joint Parties noted this inconsistency to the CPUC in their protest to SDG&E's Advice Letter 1488-E. There we explained that Ordering Paragraph 10 of the Decision states that *only* the exemptions from the DWR Power Charge applicable to customer generation load (1) that is over 1 MW in size but otherwise meets all criteria in Public Utilities Code Section 353.2 as "ultra-clean and low-emissions" or (2) that employs best available control technology standards set by local air

quality management districts and/or the California Air Resources Board, as applicable, and is not (a) back-up generation, (b) diesel-fired generation, or (c) is not described in Ordering Paragraphs 4 through 7, shall expire when the 3,000 MW cap is reached.

Ordering Paragraph 10 *expressly limits* the expiration of exemptions as follows: "Exceptions adopted in today's decision *as provided in Ordering Paragraphs 8 and 9* [i.e., for "ultra-clean" and "other" customer generation departing load] shall expire when the cumulative total of customer generation departing load eligible under those Ordering Paragraphs exceeds 3,000 MW, as determined on a first-come, first-served basis by the California Energy Commission." Neither Ordering Paragraph 10 nor any other Ordering Paragraph provides for the expiration of any other CRS exemptions. Although all customer generation counts toward the aggregate MW caps, only "ultra-clean" and "other" customer generation departing load become subject to the DWR Power Charge when the cap is met.

In addition, the Joint Parties would like to address a separate but related issue regarding the application of the queue process set forth in proposed section 1395.3 to the small clean and net-metered systems. Because the Joint Parties do not believe that the small clean and net-metered systems' exemptions from the CRS expire when the cap is met, it follows that these projects should not have to go through the queue process set forth in proposed section 1395.3. The only purpose of the queue is to determine if the cap has been met, which, as explained above, does not apply to the small clean systems.

- *Eligibility Criteria for CRS Exemptions Should Be the Same as for the Self-Generation Incentive Program (SGIP)*

During the Workshop, PG&E suggested that a 1 MW limit should be incorporated into section (c)(3)(A) to limit the eligibility for exemptions for projects meeting the requirements "for funding" under the CPUC's SGIP. The Joint Parties believe the Commission intended that the eligibility criteria for the category of CRS exemptions be the same as the eligibility criteria for the CPUC's SGIP. Specifically, the Joint Parties believe that, consistent with the CPUC's SGIP, the CPUC intended that the first MW of a project up to 1.5 MW be exempt from CRS.

As we explained in our protests to SCE Advice Letter 1700-E, CRS exemptions adopted for small clean distributed generation in the Decision expressly includes systems "eligible for participation in . . . the CPUC's self-generation program."[1] Under the CPUC's SGIP eligibility criteria, systems up to 1.5 MW are eligible for the Program, although financial incentives are only offered for up to 1 MW of capacity.[2]

Notably, the Commission adopted CRS exemptions for systems eligible for the SGIP because:

[1] D.03-04-030, p. 45.
[2] D.02-02-026, Ordering Paragraphs 3 and 7.

> The offering of a financial incentive clearly indicates a policy preference designed to encourage the installation of such systems. We intend to continue offering these types of systems a preference in order to encourage their installation.[3]

The Joint Parties believe it is entirely logical and reasonable for the CPUC to determine that the requirements for eligibility for this category of CRS exemptions should be the same as the CPUC SGIP on which the exemptions are based. No policy or legal basis has been articulated for differentiating -- on the basis of size -- between eligibility for the CRS exemptions and eligibility for the underlying incentive program. In fact, any such line drawing contradicts the policy discussion, cited above, supporting adoption of the SGIP CRS exemption category. There are references in the portions of the Decision relating to this exemption category to systems under 1.0 MW.[4] These references may be interpreted as describing the portion of any system up to 1.5 MW that is eligible for the CRS exemptions -- i.e., the first 1.0 MW is the system exempt from CRS.

The Joint Parties, therefore, request that the CEC retain proposed section 1395.2(c)(3) in its current form and not adopt the proposed 1 MW limit proposed by PG&E.

· *Eligibility Criteria for CRS Exemptions Should Not Be Tied to Funding*

As noted during the Workshop, the Joint Parties believe that the language "eligible for funding" in section 1395.2(c)(3)(A) should be revised to provide that projects that meet the eligibility requirements for the SGIP are eligible for the CRS exemptions, regardless of whether the financial incentives are actually received. As explained in our protest to PG&E Advice Letter 2375-E, we believe that this approach reflects the intent of the CPUC. There could be circumstances where a project is eligible for SGIP, but the funding may not be available because it has been exhausted for a particular year, incentive reservation limits may be met, or a project may be fully funded by another state, regional or local entity. This could result in situations where a project is eligible for the CPUC SGIP, yet not receive funding or financial incentives. We do not believe that the CPUC intended for systems that otherwise meet SGIP eligibility requirements to be subject to CRS simply because they do not actually receive SGIP financial incentives.

During the Workshop, questions arose as to how the utilities would be able to determine that a system is eligible for CRS exemptions if it had not applied for the SGIP. The representative from SCE stated that determining eligibility under the SGIP was more complicated than simply ensuring that specific technological criteria were met. The Joint Parties disagree with this assertion, and believe that determining whether a project meets the requirements of the SGIP is a fairly limited inquiry that does not require substantive analysis by the utilities. For example, CPUC Decision 09-08-037 sets out the criteria for the SGIP. Those criteria include limits on project size, types of eligible technologies, and warranty requirements, depending on the

[3] D.03-04-030, p. 45.

[4] *See, e.g.*, D.03-04-030, p. 45, footnote 70, Ordering Paragraph 7.

incentive category. An affidavit or declaration attesting that a system meets these requirements could serve to demonstrate that a system meets the eligibility criteria. Although other permits, such as air and building permits, and an interconnection agreement with the utility are required before a system may actually start operating, these are not "eligibility criteria" under the SGIP. In fact, in Decision 02-02-026, the CPUC rejected making due diligence requirements part of the process for establishing eligibility under the SGIP, finding that such requirements could create unnecessary obstacles to some projects.[5]

Based on the foregoing, the Joint Parties recommend that proposed section 1395.2(c)(3)(A) be revised to eliminate the words "for funding."

C. Eligibility Criteria for Section 1395.2(c)(4)(ii) Needs Clarification

To be consistent with Public Utilities Code section 353.2 and the Decision, the words "at least" should be deleted, and the phrase "on a higher heating value" should be added to the end of Section 1395.2(c)(4)(ii).

Comments on Process

The Joint Parties appreciate the CEC's efforts to develop regulations to implement its role under the Decision. The Joint Parties also appreciate Staff's and the CEC's focus on quickly implementing a process to enable distributed generation technologies to come online expeditiously, subject to clear rules regarding the charges that might apply to their systems. As all parties recognize, stability is crucial to creating a workable energy market. Nonetheless, the Joint Powers are concerned that it simply will not be possible for the CEC to adopt regulations implementing the Decision until crucial interpretation issues, including those discussed above, are resolved by the CPUC.

As noted, the Joint Parties have already raised most of the issues we discuss here in protests to advice letters filed by the utilities in May 2003. We anticipate, therefore, that the CPUC will clarify many of the issues raised in these comments through the advice letter process. Until that time it does not seems possible for the CEC to act on the proposed regulations without taking on the awkward role of trying to prejudge the CPUC's determinations. As noted by the CEC during the Workshop, it is not the CEC's job to interpret the underlying CRS exemption Decision, and that uncertainties must be addressed by the CPUC. We suggest, therefore, that the CEC wait for further clarification from the CPUC on these issues before proceeding with approval of the proposed regulations.

However, in the interim it is important for those that have made substantial investments in distributed generation technologies to be able to proceed with their projects. The Joint Parties agree with other commenters at the workshop that for projects where there is no interpretation dispute, which includes the small clean systems and net-metered systems under 1 MW, there

[5] D.02-02-026, p. 15.

should be an automatic exemption, as contemplated in the Decision. For other systems, a tracking system could be implemented to record when projects come online, along with operating parameters, so that eligibility for exemptions can be determined later, subject to CPUC clarification regarding interpretation disputes.

In sum, the Joint Parties urge the CEC to incorporate the comments set forth herein into the proposed regulations and the process used to finalize the regulations. The Joint Parties reiterate their appreciation for the opportunity to provide input. Please contact me at the number or email address listed above if you have any questions or require further information.

Very truly yours,

DOWNEY BRAND LLP

Kimberly A. McFarlin

cc: Service List, CPUC Proceeding R.02-01-011

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